WEE HOOD TECK DEVELOPMENT CORP. LTD.

v.

MESSRS. YONG & CO.

HIGH COURT BORNEO, KUCHING
MOHD. YUSOFF MOHAMED J
[CIVIL SUIT NO. K. 446 OF 1977]
7 JUNE 1983

CONTRACT: *Retainer to prepare memorandum of charge - Whether retainer existed - Construction of defendants' letter - Effect of subsequent conduct - Solicitor-client relationship - Presumption.*

A properly executed agreement dated 25 July 1966, was prepared by the defendants' firm between three parties, namely, the plaintiffs, the purchaser of the land and the developers. The plaintiffs had agreed to finance the purchase of the land and the construction of a house on it. A charge created by the developers already existed in favour of Bian Chiang Bank Ltd. The plaintiffs were to make certain payments so that the charge could be discharged. The plaintiffs' corporation and Bian Chiang Bank Ltd. had the same persons managing them. On 15 August 1966, the defendants wrote to the plaintiffs, enclosing a duly registered copy of the agreement in the letter (AB12) and stating, *inter alia*, that as soon as the issued document of title was ready, they would prepare a memorandum of charge to be executed by the purchaser in favour of the plaintiffs. But the lands were eventually charged to a bank by the defendants.

The issue before the Court was whether there was a contract between the plaintiffs and the defendants whereby the defendants undertook to prepare the memorandum of charge and have it duly executed in favour of the plaintiffs.

Held:

[1] There was a retainer between the plaintiffs and the defendants to prepare the memorandum of charge upon the issue of documents of title. Such a retainer was evidenced by the agreement which must be read together with the letter AB12. Further the letter was evidence of subsequent conduct showing a course of dealings. Such course of dealings can give rise to legal obligations. A retainer may even be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them. There is no legal requirement for retainers to be in writing and it is immaterial whether the solicitor is retained for reward or volunteers his service. [*Amalgamated Investment v. Texas Commerce International Bank Ltd.* [1981] 3 All ER 577; *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] All ER 57; *Donaldson v. Haldane* [1840] 7 Clause F 762, HL; *Kitchen v. RAF. Association* [1958] 2 All ER 241].

[2] The obligations of the defendants arising out of the retainer were to prepare the memorandum of charge in favour of the plaintiffs, having the charge documents properly executed, presenting it for registration and having it duly registered. But a solicitor's duty extends to a duty to use reasonable care and skill and a claim in tort can lie for breach of that duty. [*Groom v. Crocker* [1938] 2 All ER 394, 413; *Midland Bank (supra)*; *Ross v. Caunters* [1979] 3 All ER 580; *Nocton v. Ashburton* [1914] AC 932, 956].

[3] The defendants were liable to the plaintiffs for breach of their contract. Not had they failed to perform the obligations stated above but they had instead charged the lands to a third party.

[4] The defendants were also liable for breach of their duty to exercise reasonable care and skill, the plaintiffs' cause of action in tort arising upon their losing their security when the lots of land were charged to third party. The plaintiffs had relied on the defendants, who were fully cognisant of their obligations. In any event if a duty of care is owed and loss is directly caused by a breach of that duty, reliance by the plaintiffs is irrelevant. [*Ross v. Caunters (supra)*; *Midland Bank (supra)*].

[5] The defendants failed in their duty of care to their clients by their failure to consult the plaintiffs regarding the existing charges on the lots, and to enquire whether their obligation to prepare the memorandum had been superseded or came to an end by the fact that a final payment was still outstanding on these charges. A solicitor's duty is governed by the instructions of his retainer and it is an incident of that duty to consult the client on questions of doubt and to keep him reasonably informed. Instead they had placed themselves in a position of conflict of interests by acting for a third party. In such a situation the onus is on the solicitor to show that the conflicting interests did not prevent him from carrying out his duty to both clients. [*Midland Bank (supra)*; *Groom v. Crocker (supra)*; *Corderey on Solicitors*, 7th Edn. p. 70; *Goody v. Baring* [1956] 2 All ER 11; *Smith v. Mansi* [1962] 3 All ER 857 at 859].

[6] The knowledge of Bian Chiang Bank Ltd. cannot be imputed to the plaintiff's corporation. They did not share common officers, nor was there any irregularity in the internal management of the Bank, notice of which may be imputed to the plaintiffs. Knowledge of the common officer is not always the knowledge of the two companies. [*In re Hampshire Land Company* [1896] 2 Ch 743; *In re Marseilles Extension Ry. Co.* LR 7 Ch 161; *Young v. David Payne & Co.* [1904] 2 Ch 608].

[7] The plea of limitation by the defendants must fail. The defendants were guilty of fraudulent concealment and of unconscionable conduct. They kept the plaintiffs in ignorance of the fact that they had charged the two lots to a third party. By s. 18 of the Limitation Ordinance (Sarawak), the statutory period does not begin to run until the person instituting a suit has discovered any fraud by the other party. The phrase 'fraudulent concealment' covers conduct which is unconscionable. [*Kitchen v. RAF. Association (supra)*; *Beaman v. ARTS Ltd.* [1949] 1 All ER 465].

[8] The loss of the plaintiffs was purely financial. However, a purely financial loss is recoverable in a claim in negligence. [*Ross v. Caunters (supra)*].

[Plaintiff's claim allowed.]

Cases referred to:

Amalgamated Investment v. Texas Commerce International Bank Ltd. [1981] 3 All ER 577
Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1978] All ER 571
Kitchen v. RAF Association [1958] 2 All ER 241
Groom v. Crocker [1938] 2 All ER 394
Ross v. Caunters [1979] 3 All ER 580
Nocton v. Ashburton [1914] AC 932
Goody v. Baring [1956] 2 All ER 11
Smith v. Mansi [1962] 3 All ER 857
In re Hampshire Land Company [1896] 2 Ch 743
In re Marseilles Extension Ry. Co LR 7 Ch 161
Young v. David Payne & Co. [1904] 2 Ch 608
Beaman v. ARTS Ltd. [1949] 1 All ER 465
Clark v. Woor [1965] 2 All ER 353

Legislation referred to:
Companies Act 1965, s. 132
Limitation Act 1939 [UK], s. 26
Limitation Ordinance (Cap 49) (Sarawak), s. 18
Solicitors' Practice Rules [UK], r. 1

Other sources referred to:
Corderey on Solicitors, 7th Edn., p. 76, 50, 51, 49, 70

For the plaintiffs - T.O. Thomas; M/s. Thomas & Co.
For the defendants - Humphrey Ball (Patrick Tan with him); M/s. Yong & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

The Basis of the Relationship between the plaintiffs and the defendants

A purchaser, Penghulu Francis Umpau wished to buy 2 lots of land, namely 1244 and 1248 from the Developers, Ang Construction Co., for purposes of building a house on it. The plaintiffs agreed to finance the purchase of the land and the construction of the house.

An Agreement setting out the arrangement between the 3 parties, the plaintiffs, the Developers and the Purchaser was prepared. It was prepared by the defendants' firm and is dated the 25 July 1966. The Developers signed the Agreement in the presence of an Advocate in the defendants' firm. The common seal of the plaintiffs was affixed in the presence of their Director and their Secretary.

By Clause 5 of the said Agreement as soon as the Developers obtained issued documents of titles to the two lots of land then:

(a) the Developers shall execute a memorandum of transfer of the said land to the Purchaser AND simultaneously

(b) the Purchaser shall execute a memorandum of charge on the said land in favour of the Financier (the plaintiffs) as security for the repayment of the loan of RM70,000 and for the interest on the said land.

On 15 August 1966 the defendants wrote to the plaintiffs a letter (AB12) in which they enclosed a duly registered copy of the said agreement and stated, *inter alia*, that as soon as the issued document of title is ready, they would prepare ... a memorandum of charge to be executed by the Penghulu in favour of the plaintiffs.

The question that arises is whether there was a contract between the plaintiffs and the defendants whereby the defendants undertook to prepare the memorandum of charge and have it duly executed in favour of the plaintiffs.

It is noted that a retainer to prepare an Agreement is distinct from a retainer to prepare a memorandum of charge.

The Agreement by itself does not clearly establish that the retainer came into existence upon its execution.

However, the terms of the letter AB12 was written subsequent to the Agreement and made express reference to the Agreement. The reference in para. 2 of the said letter appears to be a representation by the defendants as to what they undertake to do upon the issue of the document of title. This letter only makes sense when read together with the Agreement and

appears to be explicable only if the defendants were obliged by the terms of the retainer to carry through the preparation of the memorandum of charge as envisaged by Clause 5 of the Agreement.

Further, the letter AB12 could be evidence of subsequent conduct showing a course of dealings. Such course of dealings may give rise to legal obligations. The principle was stated by Lord Denning in *Amalgamated Investment v. Texas Commerce International Bank Ltd.* [1981] 3 All ER 577:

> Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. (p. 583 h).

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it. (p. 584 a).

PW1 in his evidence said that he took it that "everything would be alright" and "my interests are protected". (Notes of evidence p. 5), and "I would not have paid the RM69,600 if not for this letter" (Notes of Evidence p. 12).

The conclusion can therefore be made that there was a retainer between the plaintiffs and the defendants to prepare the memorandum of charge upon the issue of documents of title and that this retainer is evidenced by the Agreement and the letter AB12. Further, as per Oliver J in *Midland Bank, infra,*

> ... a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them. (p. 578 c).

To contend that the effect of the letter AB12 was otherwise may even give rise to the allegation that the defendants were making an unsolicited offer to act for the plaintiffs, clearly a breach of the Legal Profession Practice and Etiquette Rules. See also r. 1 of the Solicitors Practice Rules (UK) in *Corderey on Solicitors* 7th Edn. p. 76.

It could not possibly be the intention of the defendants to commit themselves in writing to a flagrant breach of its professional rules. The contention of the defendants in its submission (p. 7) that the letter was "a representation as to the future that the defendants will do the acts indicated in the letter ..." comes dangerously close to making an unsolicited offer to act for the plaintiffs, and, clearly this could not have been the intention of the defendants.

The letter AB23 dated 22 December 1966 reinforces the view that the defendants were retained to act for the plaintiffs on the question of the charge. The instructions, if unclear any earlier, were made explicit and included that the titles to lots 1244 and 1248 were to be charged to the Corporation (the plaintiffs) together with a caveat to secure the loan to the Purchaser.

There is no legal requirement for retainers to be in writing although a written retainer is invariably advisable. *Corderey on Solicitors* 7th Edn. p. 50. Thus nothing turns on the defendants' submission that there was no formal retainer, (p. 7). A retainer may also arise by implication. See Corderey ib. p. 51. The defendants submit that the plaintiffs were under no liability to pay fees to the defendants. Clause 11 of the said Agreement states that other

legal expenses **relating only to the transfer** of the said land shall be borne equally by the Developers and the Purchaser. This, by itself, does not mean that no retainer existed, because,it is for the parties to a contract to determine who is to bear legal expenses. But, "who actually paid the bill does not, I think, matter". per Oliver J in *Midland Bank, supra,* at p. 577 (last line). Additionally Clause 11 confines the payment of legal expenses from which the plaintiffs are "exempted" only in respect of the transfer but leaves open the payment of costs for the charging of the land to the plaintiffs.

There is also no legal prohibition to bill of costs being sent after the work is completed, as was indeed the practice between the plaintiffs, and the defendants as evidenced for example by AB82: Agreement dated 15 February, 1967, Bill dated 17 February, 1967. In any event it is immaterial whether the solicitor is retained for reward or volunteers his service.

[See e.g. *Donaldson v. Haldane* [1940] 7 Clause F 762, HL and *Kitchen v. RAF Association* [1958] 2 All ER 241].

What was the Obligation Arising out of the Retainer:

A retainer is a contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations. The obligations deriving from the retainer and imposed upon the solicitor are:

(i) Those expressly agreed upon when the retainer was constituted or subsequently varied by mutual consent;

(ii) Those which the law will imply from the circumstances where nothing has been expressly agreed; and

(iii) Such obligations expressly imposed by law as are applicable to the particular retainer.

See Corderey on *Solicitors,* 7th Edn., p. 49

The nature of the contractual duty is set out by Scoot LJ in *Groom v. Crocker* [1938] 2 All ER 394 at p. 413 in these terms:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instruction in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

In the present case the obligations are expressed as contained in the letters AB12 and the further letter at AB23.

(a) This duty was to:

(i) prepare the memorandum of charge,

(ii) have it duly executed by the parties,

(iii) have it presented and registered so that the loan was thus secured.

All this had to be done upon the issue of the documents of title of the 2 lots of land.

(b) In the event of doubt the defendants were obliged to consult the plaintiffs and they were also obliged to keep the plaintiffs informed on all matters affecting their instructions to charge and register the said land.

But a Solicitor's duty to his client under a retainer is not confined to a contractual duty alone and a claim in tort can lie for breach of duty to use reasonable care and skill even when there is a parallel contractual duty of care:

per Oliver J in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] All ER 57 and *Ross v. Caunters* [1979] 3 All ER 580.

In carrying out his obligations at common law, a Solicitor contracts to be skilful and careful for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. See *Nocton v. Ashburton* [1914] AC 932 at 956.

Was there a breach of the contractual duty?

As stated earlier, the obligations of the defendants under the contract were to prepare the memorandum of charge, charging the 2 lots of land to the plaintiffs, having the charge documents duly executed by the parties, presenting it for registration and having it duly registered.

It is common ground that none of the obligations were preformed by the defendants. Instead the said lands were charged not to the plaintiffs but, eventually, to Hock Hua Bank Bhd. and so the loan by the plaintiffs to the purchaser was not secured at all. The said lands were charged to the third party by the defendants themselves so that they were instrumental in placing the securities out of the reach of the plaintiffs. As the defendants did not perform their obligations under the contract, they became liable to the plaintiffs for breach of contract.

Was there a liability in Tort?

Under the general law the relationship of Solicitor and client gave rise to a duty on a Solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the Solicitor's invitation, the client had relied on him to do. See *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER 571. (at p. 572 a - b).

PW1 has given evidence that he relied on the defendants to protect his interest (see Notes of Evidence p. 5). Additionally by the letter AB12, the defendants had expressly undertaken to attend to the charge; the letter AB23 obviously written in response to an enquiry from Datuk Yong from the defendants' firm, confirms the instructions given to the defendants to attend to the charge.

The conclusion therefore is that the plaintiffs relied on the defendants and the defendants were fully cognisant of their obligations. In any event if a duty of care is owed and the loss is directly caused by breach of that duty, reliance by the plaintiffs is irrelevant; *Ross v. Caunters* [1979] 3 All ER 580 at p. 591 h.

The defendants failed to prepare the charge, have it duly executed and registered and were for this reason in breach of their duty to exercise reasonable care and skill and the plaintiffs had a cause of action in tort against them in respect of their breach of duty. The defendants' obligation to do so was upon the issue of the documents of title and such obligation continued until it is performed, or becomes impossible of performance or until the client elects to treat the continued non-performance as a repudiation of the contract [see *Midland Bank Trust Co. Ltd. v. Stubbs. supra* p. 611 h].

In the present case upon the defendants charging the two lots of land to a third party, the plaintiffs lost their security in respect of the loan advanced and the cause of action arose then.

Were there any conditions precedent to the discharging by the defendants of their obligations, affecting their liability?

By Clause 5 of the Agreement, it was expressly agreed that the plaintiffs shall secure a discharge of charge created by the Developers in favour of Bian Chiang Ltd. to enable a memorandum of transfer and a memorandum of charge to be effected.

The defendants allege that the titles to the two lots were issued on or about the 20 July, 1967, that at the time of issue they were still subject to a charge to Bian Chiang Bank Ltd., that a sum of RM3,100 had still not been paid by the plaintiffs to the Bank, and that the Bank was not obliged to discharge these two titles until and unless the final payment was made on the due date, namely 23 September 1967. Further, despite the further charge on this property, the Bank was not relieved of its duty to discharge the 2 lots of land on full payment to them as creditors of the vendors of the purchase price. It is then alleged that if the plaintiffs had wanted the defendants to protect themselves against the Bank it was their duty to **inform** the defendants of any payment that they made to the Bank and **request** the defendants that upon the last payment being made they might call on the Bank for the discharge. See also para. 7 (a) and (b) of the Defence.

The duty of a Solicitor is directly related to the confines of the retainer, per Oliver J, in *Midland Bank Trust* case, *supra*, at p. 583 e. and that it may well be that, by the terms of the retainer, the memorandum of charge had to be prepared and executed upon the discharge of charge being secured by the plaintiffs as Clause 5 of the Agreement suggests.

This however is conditioned by further fact that the defendants, after knowing that titles were issued, acted for a third party and prepared and executed charge documents by which the two lots of lands were then charged to Hock Hua Bank. They thus acted for another client whose instructions directly conflicted with their obligations to the plaintiffs. Plainly there was a conflict of interest.

Where interests are in conflict, the Solicitor can only act for the parties with conflicting interests at his peril, and the onus of showing that the conflicting interests did not prevent him from doing his duty to both clients must rest firmly on the Solicitor.

> See *Corderey on Solicitors*, *supra*, p. 70, and *Goody v. Baring* [1956] 2 All ER 11 and *Smith v. Mansi* [1962] 3 All ER 857 at 859.

Being in this invidious position the defendants ought, in order to properly discharge their duties, have enquired of the plaintiffs whether their obligation to prepare the memorandum of charge was superseded or had come to an end.

The defendants did not seek to clarify from the plaintiffs any doubt they may have had pertaining to the retainer. DW1 says it had occurred to him to exclude the two lots from the charge but did not mention it to PW1. Further DW1 did prepare a draft as close to the instructions of the plaintiffs contained in their letter AB23 dated 22 December 1966. This clearly suggests that the defendants were mindful of their obligation under the retainer to prepare the document but seem to have done nothing further on it.

While it is agreed that there is no general duty to advise, it is equally clear that a Solicitor's duty is governed by the instructions of his retainer and [per Scott LJ in *Groom v. Crocker*, *supra*, p. 413].

> ... it is an incident of that duty that the Solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary.

In this case, the defendants chose not to clarify any doubts they may have had as to whether their instructions to charge the 2 lots were superseded by the fact that the 2 lots were still subject to a charge to the Bank which had common officers with the plaintiffs' Corporation and a final payment of RM3,100 was still outstanding; and that before 23 September 1967, the Bank proceeded to obtain a further charge over these 2 titles, nor did they ascertain whether their instructions had come to an end. They just assumed it had. Nor did they bring to the notice of the plaintiffs the fact that the land to be subsequently charged to Hock Hua Bank was the same land which they had undertaken to charge to the plaintiffs as security for the loan given to the purchaser by the plaintiffs.

In this way the defendants failed in their duty to their client in so far as they took a chance that it will be in order to charge the properties to Hock Hua Bank thereby depriving the plaintiffs of their security. The defendants could have easily ascertained from the plaintiffs whether their earlier instructions were to be superseded or had been terminated. This they failed to do and thereby breached their duty of care to their clients.

Effect on liability of knowledge acquired by the common Officers of the two companies.

Throughout the defendants' submission is the contention that as the same person (Datuk Wee Hood Teck and Harry Tnay) controlled and managed the plaintiffs' Corporation and Bian Chiang Bank Ltd. and that all knowledge and information acquired by Bian Chiang Bank Ltd. must also be the knowledge of the plaintiffs with the result that:

(a) The plaintiffs were relying on their own special control of the title deeds and on the system of charges and partial discharges and were not relying on the defendants;

(b) The Bank was under a duty to inform the plaintiffs of its intention to sell the 2 lots of land. (defendants' submission: p. 17 line 5 onwards).

The question really is whether it is right to impute knowledge of the Bank to the plaintiffs' Corporation as both these companies had common officers.

A similar problem was posed in *In re Hampshire Land Company* [1896] 2 Ch 743 and *In re Marseilles Extension Ry. Co* LR 7 Ch 161 and *Young v. David Payne & Co.* [1904] 2 Ch 608 (CA.). These case negative the general proposition that the knowledge of the common officer is always the knowledge of the two companies. The principle set down is that the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice: *In re Hampshire, supra,* p. 748.

The defendants submit that such a duty existed by virtue of s. 132 of the Companies Act, 1965 (Revised 1973) Act 125. Section 132 imposes no duty of the sort required by the authorities.

Clearly this principle does not apply to the facts of this case; the plaintiffs do not share common officers with Bian Chiang Bank Ltd. nor is there any irregularity in the internal management of the Bank notice of which may be imputed to the plaintiffs.

Plea of Limitation.

The defendants plead in the alternative that the plaintiffs' claim is barred by Limitation Ordinance (Sarawak Cap. 49) and say that the plaintiffs could and should have discovered the facts on which they base their claim against the defendants long before 30 September 1974. The writ of summons was issued on 30 September 1977 and allege that the plaintiffs are out of time.

The basis of the plaintiffs' claim is that there was concealment of right of action by fraud within the meaning of *Kitchen v. RAF Association & Ors.* [1958] 2 All ER 249. The relevant provision of the Limitation Ordinance (Sarawak) relating to fraudulent concealment of cause of action is s. 18 which states:

> 18. When any person having a right to institute a suit has, by means of fraud , been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit:
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> (a) against the person guilty of the fraud or accessory thereto; or
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> (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,
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> shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Was there Fraudulent Concealment of Right of Action?

The facts are not disputed that the documents of titles in respect of the two lots, lots 1244 and 1248, were sent to the defendants by Bian Chiang Bank Ltd. on 26 June, 1968 (Ex. D2). They caused the said two lots to be charged to Hock Hua Bank on 4 July, 1968 (AB36 - 38) without informing the plaintiffs and it was not until 30 November 1974 that the plaintiffs came to know about them, not from the defendants, but from a letter sent by Ong Tiaw Kok to Ibrahim & Co. (AB61). The defendants did not inform the plaintiffs of the dealings until 13 December 1975 (AB66) and only upon enquiry by the plaintiffs' Solicitor. Clearly the defendants were not only instrumental in placing the securities out of reach of the plaintiffs but also kept them out of the plaintiffs' knowledge.

In *Beaman v. ARTS. Ltd.* [1949] 1 All ER 465, it was held that:

> there could be fraudulent concealment of a right of action which was not subsequent to the act which gave rise to the right of action, but acquired its character from the manner in which that act was performed ...

On the facts and contrary to their obligations the defendants had not done anything to execute the memorandum of charge in favour of the plaintiffs on the documents of titles of the two lots of lands. If they were mindful of their duties, it was their obligation to consult the plaintiffs and keep the plaintiffs informed on all matters relating to the charge. Yet they made no such effort and instead surreptitiously charged the two lots to Hock Hua Bank. This, in my opinion, amounted to fraudulent concealment of the cause of action by the defendants by keeping the plaintiffs in ignorance of the wrong they had committed in charging the 2 lots of the lands to the third party.

This was an unconscionable conduct on their part. And as held by Lord Evershed in *Kitchen v. RAF. Assoc. & Ors.* [1958] 2 All ER 241:

... but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other. (p. 249 E).

Limitation Period Postponed.

By s. 18 of limitation Ordinance (Sarawak) the statutory period of limitation does not begin to run until the plaintiffs have discovered the fraud. That was on 30 November 1974. The defendants in submission say that the plaintiffs could with reasonable diligence have discovered the facts on which the claim is based before 30 September 1974. In that regard I am in agreement with the plaintiffs' Counsel that the defendants' reliance on *Clark v. Woor* [1965] 2 All ER 353 referring to due diligence has no application in Sarawak. Section 18 of Sarawak Limitation Ordinance is materially different with s. 26 of the English Limitation Act 1939 in language relating to discovery of fraud in that the provision in the Sarawak Ordinance is silent on the words "or could with reasonable diligence have discovered it" or words to that effect. This make the reference to the case cited irrelevant. In these circumstances the plea of limitation must fail.

Damages:

In this case the plaintiffs' loss is purely financial. Neither person or property nor anything else has been injured; the loss is simply that the plaintiffs have lost the security for the loan they advanced and are unable to recover the money as a result of the defendants' contractual breach of retainer and/or the defendants' negligence. The question is whether a purely financial loss is recoverable in a claim in negligence.

Sir Robert Megarry V-C, in *Ross v. Caunters* [1979] 3 All ER 580, after an extensive review of the authorities, held that the fact that the claim is for purely financial loss is no bar to liability for negligence.

There was no serious argument on the quantum of claim. The plaintiffs' claim for the loss of the money lent with interest which had been agreed. There is therefore judgment to the plaintiffs:

(a) as damages for the sum of RM66,900 lent plus agreed interest at 0.8% per mensem as from 30 September 1977 i.e. RM136,898.12,

(b) interest on RM66,900 at 0.8% per mensem from 1 October 1977 to date of judgment,

(c) 8% interest from date of judgment to date of settlement, and

(d) costs to be taxed.

Also found at [1983] 2 CLJ 98